quate so as to constitute a misdirection which had occasioned a miscarriage of justice in the circumstances of this particular case.

The other unsatisfactory aspect of this case was the ruling by the learned judge to exclude the evidence of bare denial by the accused on the ground that it constituted a defence of alibi and was therefore not admissible in the absence of notice served on the prosecution under s 402A of the CPC. The evidence expunged by the learned judge is now reproduced:

> I worked until 11am. At this time, I found my zinc building too warm and I decided to come down to Pudu Raya. I then went to the City Lights later for the 3pm show. After that I went for my dinner in the town. I reached home at about 8.30pm.

It is at this juncture that objection was taken by the DPP and after considering authorities in *Ku Lip See* v *PP*[6] and *PP* v *Lim Chen Len*,[7] the trial judge agreed that the evidence was inadmissible, being evidence in support of an alibi under s 402A. To be fair to all concerned, no one at the trial could have been aware of the decision of this court in *Vasan Singh* v *PP*[8] where a distinction was made between evidence of bare denial and evidence in support of alibi in the testimony of an accused person. Where his evidence is a bare denial, it is not evidence in support of an alibi and as such no notice is required under s 402A of the CPC. It is rather unfortunate that the accused was interrupted too early in his testimony for the purpose of determining the true nature of his defence. But as the evidence now stood, we agree with learned counsel for the appellant that the evidence excluded merely amounts to a bare denial and such evidence ought not to have been expunged. To deny the accused from putting his defence to the jury, however implausible it may appear, would most certainly occasion a miscarriage of justice, particularly having regard to the weak nature of the prosecution's case.

We would therefore allow the appeal, quash the conviction and set aside the sentence of death. The appellant is acquitted and discharged.

Appeal allowed.

Solicitors: *Bachan & Kartar.*

Reported by *Prof Ahmad Ibrahim*

Yew Wan Leong v Lai Kok Chye

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-173-89
LEE HUN HOE CJ (BORNEO), HARUN HASHIM AND GUNN CHIT TUAN SCJJ
12 MARCH 1990

Civil Procedure — Pleadings — Claim on written contract — Judgment given on point not pleaded — Importance of pleadings — Agreement to settle matter

Contract — Novation — Written contract for purchase of shares — Agreement to settle matter — Contracts Act 1950, s 63

In this case, the plaintiff had brought an action against the defendant on a contract in writing by which the defendant had agreed to buy 100,000 shares for the total sum of $350,000. On the execution of the contract, the defendant paid $35,000 by way of deposit. The purchase was not completed and the plaintiff sold the shares for $210,912.30. He claimed the sum of $139,088 being agreed liquidated damages, that is the difference between the agreed and forced sale prices. The learned trial judge accepted the contention of the defendant that the plaintiff was not in possession of the 100,000 shares on the day of completion. He however noted and accepted the evidence of the plaintiff that the defendant had offered to pay $70,000 in settlement of the matter. The learned trial judge held that if the parties to a contract had agreed to substitute a new contract or to rescind or alter it, the original contract need not be performed. He therefore held that the plaintiff was disentitled to sue on the original contract, and as he had made no claim in the alternative under the subsequent agreement, the learned judge was unable to award him $35,000 under the new contract. He therefore dismissed the claim. The plaintiff appealed.

Held, allowing the plaintiff's appeal:

(1) As the trial court had made a decision on an issue which was not raised by the parties in their pleadings, the appeal must be allowed and the order of the learned judge in dismissing the plaintiff's claim be set aside.

(2) As there was evidence which was accepted by the learned judge that the defendant had agreed to pay the plaintiff to settle the matter concerning the written contract entered into by them, and taking into account that $35,000 deposit had been paid to the plaintiff earlier on, it was ordered that the defendant pay the plaintiff the sum of $35,000 with interest.

[Di dalam kes ini, plaintif telah membuat tuntutan terhadap defendan atas suatu kontrak bertulis dengan mana defendan telah berjanji hendak membeli 100,000 saham dengan harga $350,000. Apabila kontrak itu dibuat defendan telah membayar $35,000 sebagai cengkeram. Pembelian itu tidak disempurnakan dan plaintif telah menjual saham itu dengan harga $210,912.30. Ia telah menuntut jumlah $139,088 sebagai gantirugi jumlah tertentu yang dipersetujui iaitu perbezaan antara harga yang dipersetujui dan harga jualan terpaksa itu. Hakim yang arif di dalam perbicaraan telah menerima hujah defendan bahawa plaintif tidak memiliki saham itu pada hari penyelesaian penjualan itu, akan tetapi beliau mencatatkan dan menerima keterangan plaintif bahawa defendan telah menawarkan $70,000 untuk menyelesaikan perkara itu. Hakim yang arif berpendapat jika pihak-pihak kepada sesuatu kontrak telah bersetuju menggantikannya dengan kontrak baru atau membatalkan atau mengubahnya, kontrak yang asal itu tidak boleh lagi dilaksanakan. Oleh kerana itu, beliau berpendapat plaintif tidak berhak menun-

tut atas kontrak asal dan oleh kerana plaintif tidak membuat apa-apa tuntutan alternatif di bawah kontrak kemudian itu, beliau tidak boleh menawarkan kepadanya $35,000 di bawah kontrak baru itu. Oleh yang demikian, beliau menolak tuntutan yang dibuat oleh plaintif. Plaintif telah merayu.

Diputuskan, membenarkan rayuan plaintif:

(1) Oleh kerana mahkamah yang membicarakan kes ini telah membuat keputusannya atas perkara yang tidak ditimbulkan oleh pihak-pihak di dalam surat guaman mereka, rayuan ini hendaklah dibenarkan dan perintah hakim yang arif yang menolak tuntutan plaintif diketepikan.

(2) Oleh kerana terdapat keterangan yang diterima oleh hakim yang arif bahawa defendan telah bersetuju menyelesaikan perkara mengenai kontrak bertulis itu yang dibuat oleh mereka dan memandangkan bahawa $35,000 cengkeram telah dibayar kepada plaintif lebih awal, defendan diperintahkan membayar kepada plaintif jumlah $35,000 dengan bunga.]

Cases referred to

1 *Janagi* v *Ong Boon Kiat* [1971] 2 MLJ 196 (folld)
2 *Wisma Punca Emas Sdn Bhd* v *Dr Donal R O'Holohan* [1987] 1 MLJ 393 (refd)
3 *Muniandy & Anor* v *Muhammad Abdul Kader & Ors* [1989] 2 MLJ 416 (folld)

Legislation referred to

Contracts Act 1950 s 63

Appeal from: Civil Suit No 153-1982 (High Court, Malacca)

Paul Subramaniam for the appellant.
FH D'Cruz for the respondent.

Cur Adv Vult

Gunn Chit Tuan SCJ (delivering the judgment of the court): By a contract made in writing on 14 July 1981, one Yew Wan Leong (the plaintiff) agreed to sell and one Lai Kok Chye (the defendant) agreed to buy 100,000 ordinary shares in Ganda Holdings Bhd at the price of $3.50 per share amounting to $350,000. On the execution of the said contract, the defendant paid the plaintiff $35,000 by way of deposit and it was agreed that the balance would be paid and the sale completed on or before September 1981. It was a term of the contract that in the event that the defendant fails to complete the purchase, the plaintiff shall be entitled to retain the said sum of $35,000 received as a deposit from the defendant and the defendant would have to indemnify the plaintiff in a sum equal to the difference between the sum received by him from the sale of the said shares to any listed share brokers and the purchase price mentioned in the said contract. It was also provided in the said contract that time whenever mentioned should be the essence of the contract.

The plaintiff in his statement of claim averred that he was ready and willing to perform and complete the said sale on or before 30 September 1981, but at the oral request of the defendant on 26 September 1981, he granted an extension of time of four days for completion of the purchase and payment of the agreed balance price of $315,000. It was also contended by the plaintiff that by requesting and granting the extension of time to complete the purchase, time was no longer made the essence of the contract and the parties by their conduct had waived the time being the essence of the contract.

The defendant in his statement of defence averred that he had no communication whatsoever with the plaintiff as alleged and that there was no waiver of any of the terms of the contract. The plaintiff, however, gave evidence in the High Court that he and the defendant met at the Fairmont Hotel, Ipoh, on or about 1 or 2 October 1981. He had the shares ready for delivery but stated that the defendant claimed that he had lost quite a large sum of money playing shares and that he could not raise the required sum of money. He also said that the defendant then asked him to reduce the amount and was prepared to pay him $70,000 in lieu of taking up the shares. That sum of money was not paid by the defendant and on 5 October 1981, the plaintiff delivered 100,000 Central Securities shares through their respective bankers (exh P6) but the shares were returned to the plaintiff on 11 November 1981 through the same bankers as the defendant refused to accept them. The plaintiff sold the shares between 9 October 1981 and 30 November 1981 for $210,912.30 and therefore claimed $139,088 being agreed liquidated damages, that is, the difference between the agreed and forced sale prices.

In support of his case, the plaintiff called his bank manager to prove that the shares had been dispatched to the defendant's bankers and were returned unpaid on 11 November 1981. The plaintiff also called an accountant attached to a firm of stock brokers called Kin Khoon & Co to show that he had purchased and possessed 100,000 Ganda Holdings Bhd's shares as at 24 September 1981 and was in a position to deliver them for sale on that date. That witness also produced a letter from his firm to confirm that the plaintiff had in fact purchased 100,000 Ganda shares as at 24 September 1981. Another witness called by the plaintiff was one Su Sein Thong (PW5) who had introduced the defendant to the plaintiff and who was a witness to the agreement signed by them on 14 July 1981. PW5 also confirmed that the parties met at the Fairmont Hotel where it was agreed that $70,000 would be paid by the defendant to the plaintiff to settle the matter.

The defendant who had averred in his statement of defence that he rejected the alleged delivery of the shares in question because they were not delivered in accordance with the express terms of the said contract, chose not to give any evidence but to discredit the plaintiff's case by contending that certain inferences should be drawn from both the plaintiff's oral and documentary evidence. His defence was generally that the plaintiff had departed from the terms of the said contract and was therefore in breach of it. The first alleged breach was for holding out that he

was the registered owner of the shares at the time the agreement was signed when he was not so. The second and main objection was for failure to deliver the shares before the completion date. The learned judge found that the first issue raised by the defence was a trivial one and was in his opinion immaterial. He held that the fact the plaintiff had yet to obtain those shares was not so material as his ability to deliver them to the defendant on or before the completion date. The learned judge considered that the second issue, ie the late delivery of the shares, merited serious consideration, and noted that although the defendant did not seriously challenge the evidence about the subsequent meeting between the parties at the Fairmont Hotel, he, however, accepted the contention of the defence and drew the inference that the plaintiff was not in possession of the 100,000 shares by 25 or 26 September 1981, because of his hurried communication by telephone with the defendant and the subsequent meeting between the parties which lasted for a few hours. With respect, we considered that the learned judge had drawn the wrong inference that it was the plaintiff who had sought the extension of time for completion of the contract because of the several urgent attempts to contact the defendant before the date of completion. He had also misconstrued the contract notes marked exh P3A-X which were not contract notes by which the plaintiff had bought the shares in question but were in fact contract notes by which he had sold the shares from 9 October 1981 onwards after the defendant had failed to take delivery of them in accordance with the terms of the contract in question. The learned judge had also forgotten or given no weight to exh P4 which showed that the plaintiff had already purchased and was ready to deliver those 100,000 shares by 24 September 1981. He, however, noted and accepted the evidence of the plaintiff that the defendant had offered to pay him $70,000 in settlement of the matter or in other words, to pull out of the said agreement and held that that fact could not be challenged by the defendant because he had elected not to give any evidence at all. He also held and accepted the evidence of the plaintiff that the defendant did not have any money to pay for the balance of $315,000 if and when the shares were delivered. After finding that the defendant had agreed to pay $70,000 and having noted that a sum of $35,000 was paid as deposit earlier on and that the plaintiff could only claim for another $35,000, the learned judge however considered that he was in no position to award that sum 'due to the legal implication arising from this transaction'. He said that the claim by the plaintiff was based 'on the original contract and not the subsequent oral agreement' and concluded that the parties 'had agreed to rescind the former contract and to substitute another contract the terms of which were he was to retain the shares and the defendant to pay him $70,000'. He then went on to consider s 63 of the Contracts Act 1950, concerning the effect of novation, rescission and alteration of contracts and stated that if the parties to a contract agreed to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed. He therefore considered that the plaintiff was disentitled to sue on the original contract and as he had no claim in the alternative under the subsequent agreement, he was unable to award the $35,000 which in his opinion the plaintiff would have been entitled to and therefore dismissed his claim, but in doing so granted him leave to institute fresh proceedings.

Mr Subramaniam, counsel for the appellant, pointed out that the learned judge had decided on an issue which was not reflected in the pleadings or the submissions of the parties. He stressed that the substitution of a new contract under s 63 of the Contracts Act 1950 was never an issue between the parties and referred to the written submission of defence in the court below in which Mr D' Cruz, counsel for the defendant, had asked the court to rely on the written agreement in this case. Counsel also pointed out that the defendant had pleaded that there was no waiver of the original agreement and had not pleaded any oral agreement, which he urged the court to ignore, as neither side had pleaded a new contract. The learned judge had therefore erred in holding that there was a new substituted contract, and reference was made to *Janagi* v *Ong Boon Kiat*[1] in which Sharma J (as he then was) had made observations on the function of pleadings and the duty of courts to follow rules of procedure and practice. We agreed with the following passage in the judgment of the learned judge in that case in which his Lordship stated:

> The court is not entitled to decide a suit on a matter on which no issue has been raised by the parties. It is not the duty of the court to make out a case for one of the parties when the party concerned does not raise or wish to raise the point. In disposing of a suit or matter involving a disputed question of fact, it is not proper for the court to displace the case made by a party in its pleadings and give effect to an entirely new case which the party had not made out in its own pleadings. The trial of a suit should be confined to the pleas on which the parties are at variance.

Counsel also referred to *Wisma Punca Emas Sdn Bhd* v *Dr Donal R O'Holohan*[2] at p 395 in which case this court had also referred to *Janagi* v *Ong Boon Kiat*[1] and considered that Sharma J had rightly held that the trial of a suit should be confined to the pleas on which the parties are at variance.

Although Mr D'Cruz conceded that in the statement of defence there was no pleading regarding a new substituted contract, he stated that when the defendant elected to lead no evidence, he took the risk that the plaintiff could or could not prove his case. He referred to a letter from Malayan Banking Bhd dated 5 October 1981, to the defendant's bank concerning the delivery of 100,000 Central Securities Bhd's share certificates (exh P6) and also to his submission in the court below that the shares dispatched

to his client according to exh P6 were 100,000 Central Securities Holdings Bhd's shares and contended that it showed that they were not Ganda Holdings Bhd's shares. He contended that although the defendant did not plead the substitution of a new contract, the plaintiff's evidence referred to a new contract and the learned judge found it to be so. He contended that the learned judge had come to the right conclusion albeit for wrong reasons.

In his reply Mr Subramaniam pointed out that in his statement of defence the defendant never pleaded that wrong shares were delivered. He also referred to his submission in the court below when he had pointed out that Central Securities (Holdings) Bhd was the former name of Ganda Holdings Bhd.

We would point out that this court has recently once again stressed the importance of pleadings in *Muniandy & Anor* v *Muhammad Abdul Kader & Ors*[3] in which Mohamed Azmi SCJ stated at p 418 that:

> Unless the objection raised is merely technical, the importance of pleadings can be found in many authorities. The most instructive is perhaps by Lord Diplock in *Hadmor Productions* v *Hamilton* [1983] 1 AC 191 at p 233:
>
> 'Under our adversary system of procedure, for a judge to disregard the rule by which counsel are bound, has the effect of depriving the parties to the action of the benefit of one of the most fundamental rules of natural justice, the right of each to be informed of any point adverse to him that is going to be relied upon by the judge, and to be given the opportunity of stating what his answer to it is ...'

As the High Court had made a decision on an issue which was not raised by the parties in their pleadings, the appeal in this case must be allowed and the order of the learned judge in dismissing the plaintiff's claim set aside. As there is evidence which was accepted by the learned judge that the defendant had agreed to pay the plaintiff to settle the matter concerning the written contract entered into by them on 14 July 1981, and taking into account that $35,000 deposit had been paid to the plaintiff earlier on, we therefore ordered the defendant to pay the plaintiff $35,000 together with interest at the rate of 8% pa from the date of the judgment of the High Court to the date of realization and costs here and in the court below. The deposit of $500 was also ordered to be refunded to the plaintiff.

Appeal allowed.

Solicitors: *Maxwell Kenion Cowdy & Jones*; *Tay Leong Siak & Co.*

Reported by *Prof Ahmad Ibrahim*

Hiap Yiak Trading Sdn Bhd & Ors v Hong Soon Seng Sdn Bhd

HIGH COURT (MUAR) — ORIGINATING MOTION NO 25-11 OF 1989
RICHARD TALALLA JC
25 FEBRUARY 1990

Land Law — Agreement for sale and purchase of land — Whether a loan or sale — Triable issues — Caveat against own land by registered proprietor — Second caveat after withdrawal of first caveat — Application for removal of caveat by purchaser — Whether should be removed

In this application, the plaintiffs applied for the removal of a caveat lodged by the defendants who are the registered proprietors of the land. The plaintiffs claim that the first four plaintiffs were purchasers of the land which they subsequently sold to the fifth plaintiff. The defendants deny selling the land and contend that the true transaction was one in which they borrowed money from the first plaintiff in order to prevent an auction of the land by a bank.

After discharge of the charge by the bank, the issue document of title to the land was handed to the common solicitors. No transfer has been executed. The title remains in the name of the defendants. The defendants have commenced proceedings in which they claim the return of the land. In order to protect their interest, they caused the caveat to be entered against the land, after having voluntarily withdrawn an earlier caveat.

Held, dismissing the plaintiffs' application:

(1) The defendants were entitled to cause a caveat to be entered against the land notwithstanding that they are its registered proprietors.

(2) The onus is on the defendants as caveators to satisfy the court that on the evidence presented, their claim to the land raises a serious question to be tried. The defendants must show that on the balance of convenience, it is better to maintain the status quo until the trial of the action, by preventing the plaintiffs from disposing of the land to some third party. The court was satisfied that such onus has been discharged. The nature of the agreements and the amounts described as compensation or damages are issues that should be tried.

(3) The fact that the defendants had entered an earlier caveat which they subsequently withdrew voluntarily does not prevent them from entering a second caveat.

[*Editorial Note*: The plaintiffs have appealed to the Supreme Court vide Civil Appeal No 02-101 of 1990.]

Cases referred to

1 *Societe Generale* v *Good Property Land Development Pte Ltd* [1989] 2 MLJ 24 (folld)
2 *Eng Mee Yong & Ors* v *V Letchumanan* [1979] 2 MLJ 212 (folld)
3 *Hock Hin Bros Sdn Bhd* v *Low Yat Holdings Sdn Bhd* [1984] 1 MLJ 92 (folld)

Subra Naicker for the first, second, third and fourth plaintiffs.
Wong Kim Fatt for the fifth plaintiff.
AK Yeong for the defendants.

Cur Adv Vult